82-1343

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

ABE ROBERT HONIGMAN, Petitioner

vs.

UNITED STATES OF AMERICA, Respondent.

Petition For A Writ Of Certiorari To The
United States Court of Appeals
For The Ninth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Whether 18 USC 2314 is violated where a "bad check" is negotiated in interstate commerce by the deposit of an out of state check, upon insufficient funds, in a local bank with the authorization of the account holder, i.e. whether 18 USC 2314 is a federal "bad checks" statute.

2. Whether the terms "falsely made" and "forged", as used in 18 USC 2314 are synonymous or distinct, and whether the instructions in the instant case were defective in failing to convey that a check executed with intent to defraud but with authority of the account holder/signator is neither forged nor falsely made.

3. Whether, under 18 USC 2314, a conviction may be sustained for interstate transportation of a forged or falsely made check, where the account in question is in the name of an actual rather than fictitious person, the defendant claims authorization from that person to sign checks in that name, and

the account holder does not testify at trial as to lack of authorization.

4. Whether where the defense of authorization is presented, an instruction on lack of authorization must be given sua sponte to prevent the jury from confusing the elements of forgery where there may be an authorized signature and knowledge of insufficient funds in the account.

5. Whether lack of authorization to sign on a checking account may be established primarily by the introduction of evidence of prior acts of forgery as to persons other than the account holder in question and by evidence of the writing of checks against insufficient funds on one's own account.

6. Whether a check is a "security" within the meaning of 18 USC 2314.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

ABE ROBERT HONIGMAN, Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ Of Certiorari To The
United States Court of Appeals
For The Ninth Circuit

ABE ROBERT HONIGMAN, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeal for the Ninth Circuit, entered in this case on July 15, 1982.

OPINION BELOW

The judgment of the Court of Appeals for the Ninth Circuit was designated "Not for Publication" and appears in the Appendix hereto.

JURISDICTION

The judgment of the Court below (Appendix, infra, p. 1) was entered on July 15, 1982. Rehearing was sought and denied on August 19, 1982. The jurisdiction of this Court is invoked under 28 USC Section 1254(1).

STATUTORY PROVISIONS INVOLVED

1. In pertinent part, United States Code, Title 18:

Section 2314. Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting

Whoever, with unlawful or fraudulent intent, transports in interstate or

foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited;

...

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

...

STATEMENT OF THE CASE

Petitioner, ROBERT DAVIS AUSTIN, born ABE ROBERT HONIGMAN was indicted on December 18, 1980 on 14 counts of violation of 18 USC 2314, interstate transportation of forged securities. On March 27, 1981, after jury trial in the United States District Court, Central District of California, a verdict of guilty was returned on all 14 counts.

The gravamen of the offense involved the negotiating and cashing in Los Angeles area banks of certain checks drawn upon an out of state bank, which checks were subsequently dishonored by the drawee bank. The checks in question were made payable to the Petitioner,

endorsed and cashed by him. According to the testimony of the Petitioner, they were signed by the Petitioner in his mother's name as authorized by his mother Etta Honigman. Petitioner also asserted that his mother had promised to "cover" the checks which he presented. Etta Honigman was never produced and never testified at trial. There was evidence introduced on the efforts of both the Government and the defense to secure her presence.

The Government presented evidence as to prior acts of the Petitioner with respect to a prior series of transactions in which he affixed the name of a Sandra Ramirez, a former girlfried, to checks payable to himself which he subsequently negotiated. (Hereafter referred to as the "Ramirez checks") Ms. Ramirez testified that she had not given him authority to do so.

The Government also presented evidence that the Petitioner himself had negotiated "non-sufficient funds" checks drawn upon his own account and bearing his own signature, some two years prior.

Pursuant to stipulation, Petitioner

admitted that he had affixed the name of "Etta Honigman" to the checks in question.

The jury was instructed that:

(1) "A falsely made or forged security is one that is fictitiously made or signed with the intent to defraud. It is not genuine."

(2) "Including a statement in a claim or document is false if it was untrue when made and was then known to be untrue by the person making it or causing it to be made."

(3) "A statement or claim or document is fraudulent if it was falsely made or caused to be made with the intent to deceive."

(4) "You are instructed that the checks referred to in the indictment are "securities" as that term is used in these instructions and in the statute just read to you."

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL, AND IMPLIEDLY THIS COURT, AS TO THE PROPER INTERPRETATION OF 18 USC 2314.

Section 2314 of Title 18 provides criminal sanctions for one who "with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered or counterfeited."

No question is presented herein on the issue of interstate transportation.

The primary thrust of the assignments of error revolve around the elements and definitions of "forged" and "falsely made" and the notion of "authorization" as contemplated by the statute in question.

The Petitioner, at trial, presented evidence that the writing of the checks to himself, on an account held by his mother, was in fact authorized by his

mother. He also asserted that his mother had promised to "cover" the checks which he presented and had given him authorization to sign her name, "Etta Honigman", to those checks. Etta Honigman was never produced and never testified at trial. There was evidence introduced on the efforts of both the Government and the defense to secure her presence.

Pursuant to stipulation, Petitioner admitted that he had affixed the name of "Etta Honigman" to the checks in question.

Thus evidence was presented by the defense on the issue of "fraudulent intent" and on the issue of "authorization" as bearing on the element of "forgery".

The jury was instructed, as set forth in the "Statement of the Case," that:

(1) "A falsely made or forged security is one that is fictitiously made or signed with the intent to defraud. It is not genuine."

(2) "Including a statement in a claim or document is false if it was

untrue when made and was then known to be untrue by the person making it or causing it to be made."

(3) "A statement or claim or document is fraudulent if it was falsely made or caused to be made with the intent to deceive."

(4) "You are instructed that the checks referred to in the indictment are 'securities' as that term is used in these instructions and in the statute just read to you."

There seems to be almost universal agreement among the Courts of Appeal that the writing of a check upon insufficient funds is not a forgery or violation of 18 USC 2314, where the person writing the check signs his own name. United States v. Brown (1957, CA2 NY) 246 F.2d 541; United States v. Gallagher (1950, DC Pa) 94 F Supp 640; Cunningham v. United States (1959, CA4 NC) 272 F.2d 791; Fowler v. United States (1957, CA5 Ga) 242 F.2d 860; United States v. Hagerty (CA5 La) 561 F.2d 1197; Greathouse v. United States (1948 CA4 SC) 170 F.2d 512; Melvin v. United States (1963), CA7 Ill.) 316 F.2d 647; United

States v. Garfinkel (1960, CA7 I11) 285 F2d. 548; Martyn v. United States (1949), CA8 Mo.) 176 F.2d 609; Wright v. United States (1949, CA9 Ariz) 172 F.2d 310; Marteney v. United States (1954, CA10 Kan) 216 F.2d 760; United States v. Greever (1953), DC Dist Col) 116 F Supp 755; United States v. Wood (1945, DC N.D. W Va) 58 F. Supp. 451; United States v. Flores (1946, DC VI) 66 F. Supp. 880. And where such a check is caused to be transported in interestate commerce, this is not a violation of 18 USC 2314.

Further, where one affixes the name of another upon a check with that person's authorization, this neither constitutes a forgery under 18 USC 2314. Greathouse, supra; Cunningham, supra; Wright, supra; Fowler, supra; United States v. Lewis (1979, CA5) 592 F.2d 1282; Parker v. United States (1961 CA5) 297 F.2d 135; United States v. Axtman (1978 CA9) 574 F.2d 474.

There is however, conflict among the federal circuits as to the terms "falsely made" and "forged" with respect to whether these terms are to be

construed as synonymous or distinctive. In addition, the circuits are in disagreement as to the circumstances under which the use of a fictitious name would constitute a forgery.

The Fourth, Ninth, Tenth and District of Columbia circuits apparently view the two terms as synonymous, homogeneous, descriptive of the same conduct and "partaking of each other." That is, the two terms synonymously describe a spurious or fictitious making as distinguished from a false or fraudulent statement or content. Greathouse (CA4), supra; United States v. Jones (DC Md) 414 F. Supp 964; Wright (CA9), supra; Marteney v. United States (1954, CA10 Kan) 216 F.2d 760; United States v. Scott (CA10 Kan) 457 F.2d 848, cert den 409 U.S. 866; United States v. Crim (CA10 Kan) 527 F.2d 289, cert den 425 U.S. 905; United States v. Sparrow (CA10 Utah) 635 F.2d 794 cert den 450 U.S. 1004; United States v. Williams (CA10 Utah) 498 F.2d 547; United States v. Greever (1953, DC Dist Col), supra.

The Second, Fifth, Sixth and Eighth

circuits have held that the terms "forgery" and "falsely made" are distinctive, non-redundant terms describing distinctly different conduct. United States v. Brown, (1957 CA2 NY), supra; United States v. Green (1966, DC NY) 293 F. Supp. 999; Stinson v. United States, (1963 CA5 Fla) 316 F.2d 554; United States v. Hagerty (CA5 La), supra; United States v. Huntley (CA5 Tex) 535 F.2d 1400; United States v. Bales (1965, DC Tenn) 244 F. Supp. 166; Pines v. United States (1941, CA8 Mo) 123 F.2d 825. Construing the two terms as distinctive allows a broader range of fraudlent conduct to come under the purview of the statute.

The Eighth, Fifth and Ninth circuits have, in addition, rendered opinions internally inconsistent with other of their opinions on this issue. The Eighth circuit held that the two terms were synonymous in Rowley v. United States (1951, CA8 Mo) 191 F.2d 949 and in Belle v. United States (CA8 Mo) 537 F.2d 979, cert den 97 S.Ct. 360. The Fifth circuit ruled inconsistently in Edge v. United States (1959 CA5 Ga)

270 F.2d 837 that the two terms are synonymous. The Ninth circuit, in United States v. Price (1981 CA9) 655 F.2d 958, while refusing elaborate in detail, held that the terms "forged" and "falsely made" are not "precise semantic equivalents", and that in that case there was both a forgery and a false making. Price, at p.960.

The Ninth circuit, as set forth in Wright, supra, and cited with approval in Price, supra, defined "forgery" as the "false making or materially altering, with intent to defraud, of any writing, which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability. "False making" the Court opined in both Wright and Price, is the essential conduct element of forgery where there is no material alteration involved. Further, the Court held that the "false making" has reference to the manner in which the writing is made or executed rather than to its substance or effect. That is, the Wright Court stated, "the genuine making of a writing, which contains false or misleading statements is not

false making or forgery." Wright, at p. 311. Further, "the genuine making of a writing for the purpose of defrauding another is not forgery." Wright, at p.311. The Court in Wright rejected the argument that, by implication, a check written against insufficient funds is a false representation that the person writing the check has sufficient funds in the account. As stated by the Wright court, "It may well be said that, by implication, <the checks> falsely represented . that appellant had sufficient funds in the drawee bank to pay them upon their presentation, and that facts will suport an assumption that he intended to use them to defraud, but that does not justify classifying the checks as 'falsely made' or 'forged' within the meaning of the National Stolen Property Act." Wright, at p. 312. The Ninth circuit, in U.S. v. Price, commented that the Wright distinction "makes good sense in the section 2314 context in view of the fact that the fraudulent intent required for a section 2314 violtion attaches to the transportation of the security and not to

the creation or alteration of the security." Price, fn 3.

In accord with the view that "falsely made" refers to the manner of execution i.e genuineness, as opposed to falsity of content or representations within the document are Sparrow, supra, Scott, supra, United States v. Smith, 262 F. 191 (1920), and by analogy, United States v. Staats (1850) 8 How. 41, and United States v. Davis (1913). 231 U.S. 183.

The view that a check drawn upon insufficient funds with intent to defraud is not forgery or a "false making" is in conflict with the holding the the Fifth Circuit in United States v. Seay (DC I11) 386 F. Supp. 550, affd (CA7 I11) 518 F.2d 646. In that case the Seventh circuit held that the transportation of a check for which there was insufficient funds on deposit constituted a violation of 18 USC 2314 if the check was part of a scheme to defraud.

The recent holding of this Court in Williams v. United States (1982), 102 S.Ct. 3088 impacts significantly upon the

issues in the instant petition and, petitioner urges, mandates the grant of certiorari to finally clarify the federal standard in prosecutions under 18 USC 2314.

In Williams, in the context of a prosecution under 18 USC 1014, this Court held that the actions of the petitioner involving "check kiting", i.e. depositing of a "bad check" in a federally insured bank, was not the making of a "false statement." This Court held that a check is not a factual assertion at all, and therefore connot be characteried as true or false. Williams, at p. 3902. Rather, a check is merely a direction on the part of the drawer to the drawee bank to pay the face amounts to the bearer, while committing the drawer to make good the obligations if the banks dishoners the draft. This Court specifically rejected the Government's argument that when the drawer has insufficient funds in his account at the moment the check is presented, that he has effectively made a "false statement."

Applying the holding of the

Williams case to the issues presented by this petition, it would seem that Williams would support the view of the jurisdictions which have held that the making of a check upon insufficient funds is not a "false making" within the context of 2314, and which hold that the terms "forged and "falsely made" are synonymous.

Thus, it would appear that the jury instructions in the instant case were defective in failing to so indicate that the mere writing of a "bad check", even with intent to defraud, is not a violation of 18 USC 2314. Thus the instruction proferred by the trial court that a "falsely made or forged security is one that is ...signed with the intent to defraud..." is erroneous. As such, petitioner's conviction must be reversed.

The opinion in the Williams case was delivered after the opinion isssued in the instant case. A Petition for Rehearing was requested in light of the decision in Williams, but was denied.

The thrust of petitioner's defense in the trial court was that he was authorized by his mother to sign her

name upon the checks drawn on her out-of-state account. Much evidence was presented on prior bad acts of the petitioner concerning the writing of "bad checks" both on his account and on the account of Sandra Ramirez.

Considering the evidence which was introduced by the Goverment, coupled with the instruction which indicated that the signing of a check with the intent to defraud fell within the proscriptions of 2314, the jury could likely have concluded that the petitioner wrote the checks in collusion with his mother, with her authorization, and with the knowledge that the checks were drawn upon insufficient funds. The instructions as given would allow the jury to convict upon such a theory. Clearly this is not, or should not be the law.

In considering this assignment of error, Petitioner urges the court, in view of the ambiguity in the interpretation of the statute in question, to apply the rule of lenity to construe the statute narrowly so as to resolve any ambiguity in favor of

lenity. United States v. Bass, 404 U.S. 336, 92 S.Ct. 515 (1971). This policy would be well utilized here for its avowed purpose of encouraging Congress to speak clearly, thus giving the populace "fair warning" of the line between criminal and lawful activity, an in order to have the legislature, not the courts, define criminal activity. Bass, at p. 347-8.

2. THE INSTANT CASE PRESENTS AN IMPORTANT QUESTION TO BE RESOLVED BY THIS COURT AND RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE EXTENT OF THE ROLE OF THE FEDERAL JUDICIARY IN THE PROSECUTION OF "BAD CHECK" CASES, AN AREA ALREADY ADDRESSED IN COMPREHENSIVE FASHION BY STATE LAW.

A decision by this Court is necessary in this case and in this area, to delineate the role of the federal judiciary in the prosecution of "bad checks" cases. The instant case, if prosecuted upon the theory advanced below, points up the overlap between

state and federal legislation which would occur in this area. Presumably, Congress intended, in passing 18 USC 2314 and its predecessors, that the conduct proscribed be other than that which was already prohibited by state laws.

In Williams, supra, rendered by this Court last term, and in earlier opinions of this Court and the circuits, it is clear that there is no need, and indeed a reluctance on the part of the federal judiciary to devote the time and energy of the federal courts to areas which are well covered and policed by state legislation. United States v. Wood, supra; United States v. Flores. Indeed, this Court in Williams stressed, in its analysis of the legislative history and intent of 18 USC 1014, that the area sought to be covered by the broad interpretation of the Government was already addressed in comprehensive fashion by state law. In Wood, the Court, speaking of 18 USC 2314, opined:

"...Congress never intended, when it enacted the Statute in question, to make the Federal Judiciary a collection

ageny for bad checks. The injured hotel has a complete an adequate remedy under the State criminal laws... I see no reason why the Federal Courts should be burdened with matters of this kind. If prosecutions of this nature were sustained, any person, giving a bad check upon a foreign bank, regardless of amount, whether for $1 or $5, would be subject to Federal prosecution, and the District Courts would be turned into police or justice of the peace courts, a course which I do not propose to adopt."

Wood, at p. 452, quoted in Flores, supra

The decision of the Court below, and the policy which would allow the District Courts to engage in the litigation of cases such as the one at bar would, indeed, reduce the District Courts to the level of lower state courts, the very evil which was sougt to be avoided in Williams, Wood and Flores, supra. The area of "bad checks" is certainly well encompassed within the laws of every state. There is no need for the Federal Judiciary to so occupy itself, and indeed, policy requires

otherwise.

Absent a clear statement of purpose from Congress, the Court should decline to read a federal criminal statute in a way that would encroach on a traditional area of state criminal jurisdiction. United States v. Bass, supra. Williams v. United States, supra. Indeed, as stated by this Court in Williams, last term:

"...it would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the deposit of bad checks." Williams, at p. 3095

3. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEAL, AND OTHER DECISIONS OF THE NINTH CIRCUIT, AS TO THE SUFFICIENCY OF EVIDENCE TO SUSTAIN A CONVICTION UNDER A FORGERY STATUTE.

In the case at bar, no direct evidence was presented on the issue of

lack of authorization sign on the part of Petitioner to sign the name of his mother, Etta Honigman, to the checks in question. In fact, Petitioner's defense consisted of evidence that such authorization was in fact given and acted upon in good faith.

The Court below held that the element of lack of authorization and the conviction was sustained by circumstantial evidence. This evidence consisted, in large part, of evidence that the Petitioner had previously done a similar act with respect to one Sandra Ramirez (the "Ramirez checks) and had written checks on insufficient funds upon his own checking account.

Petitioner urges this court to grant certiorari in order to resolve the issue of whether lack of authorization in a case such as the one at bar may be proven by circumstantial evidence, or even by evidence of prior similar acts.

In Ryno v. United States (1956, CA9), 232 F.2d 581, the Ninth circuit held, in the context of corpus delictum for a confession, that lack of authority may be proven by direct or circumstantial

evidence. That case, however, did approve, on its facts, the California case of People v. Maoli, 135 C.A. 205 (1933), which held that the testimony of the person who had the power to give authority is essential and the testimony of an offical of a bank as to the limitations on the bank's authority to honor checks is not adequate,

The holding in the instant case, and in Ryno, supra, is in apparent conflict with the holding of the Ninth circuit in United States v. Axtman (1978, CA9), 574 F. 2d 474, wherein the Court impliedly held that where the drawee is a real person who may have authorized the check, circumstantial evidence may not be enough to sustain the conviction.

Also in conflict with the decision below is the holding of the Fifth circuit in Parker v. United States (1961, CA5), 297 F.2d 135. There the Court held that even with ample evidence that there was no express authorization, evidence was insufficient to support the verdict where there was no evidence that the holder of the account, who was known

to the defendant, would not honor the checks written and signed by the defendant using the holder's name.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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January 3, 1983

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JULY 15, 1982

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee	No. 91-1198
vs.	D.C. No. CR
ABE ROBERT HONIGMAN, aka ROBERT DAVIS AUSTIN, Defendant-Appellant	80-1099 DVK
	MEMORANDUM

Appeal from the United States District Court for the Central District of California

The Honorable David V. Kenyon, District Judge, Presiding

Argued and Submitted May 6, 1982

Before: ANDERSON, SKOPIL and CANBY, Circuit Judges

Appellant was convicted on all fourteen counts of the indictment for interstate transporation of forged securities, 18 U.S.C. section 2314.

EVIDENCE

In this appeal, appellant argues the admission of prior "bad act" evidence, in violation of F.R. 404(b), was prejudicial error. The court properly undertook the balancing discussed in Rule 403 of the probative value of the evidence with its prejudicial impact. U.S. v. Sangrey, 586 f.2d 1312, 1315 (9th Cir. 1978). Charged with this offense, one element of which is intent or knowledge to defraud, the prosecutorial introduction of the Ramirez checks was proper. U.S. v. Walls, 577 F.2d 690, 696-7 (9th Cir. 1977), cert. denied, 439 U.S. 893, 58 L.Ed.2d 239 (1978). The court, in ruling they could be introduced under Rule 404(b), did not abuse its discretion.

Appellant also complains of the introduction of eight checks not charged in the indictment, and checks he drew on his own personal account that were returned marked "not sufficient funds." It is within the court's discretion to

accept ths evidence as proof of knowledge, plan, or absence of mistake or accident following the weighing process described above. In addition, the court did give an instruction appropriately limiting the jury's use of this evidence.

TRIAL PROCEEDINGS

The allegation of prosecutorial misconduct is similarly without merit. There was no objection at the time of the closing argument. However, even if an objection had been voiced, in light of the circumstances of this case, we cannot conclude the error was excessive to the point of denying appellant a fair trial.

Cooper v. Fitzharris, 586 F.2d 1325 (en banc) (9th Cir. 1978), cert. denied, 440 U.S. 974, 59 L.Ed.2d 793 (1979), is the law in the area of ineffective assistance of counsel. Though appellant's trial counsel admitted eror in failing to object to hearsay testimony, this is insufficient; relief will be granted "only if it appears <defendant> was prejudiced by counsel's conduct." Id. 586 F.2d at 1331. In light of the overwhelming evidence of appellant's guilt, the errors made were

not prejudicial.

SUFFICIENCY OF EVIDENCE

Appellant argues lastly there was not substantial evidence to support his conviction since it was necessary to prove he lacked authority to sign his mother's checks. It is true that the evidence of guilt here is circumstantial. However, that fact alone is not determinative since we have many times rejected the distinction between the weight given direct as compared with circumstantial evidence. The jury is merely to "weigh all of the evidence, direct and circumstantial, against the standard of reasonable doubt." U.S. v. Nelson, 419 F.2d 1237, 1241 (9th Cir. 1969); U.S. v. Federico, 6548 F.2d 1337, 1343 (9th Cir. 1981). Circumstantial evidence can be used to prove any fact and is sufficient to sustain a conviction. U.S. v. Ramirez-Rodriguez, 552 F.2d 883, 884 (9th Cir. 1977); U.S. v. Nelson, 419 F.2d at 1241.

We find the other arguments of appellant lack merit. Accordingly, the conviction is

AFFIRMED.